IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 976 OF 2001

IN

TESTAMENTARY SUIT NO. 49 OF 1989

IN

TESTAMENTARY PETITION NO. 209 OF 1989

RAMCHARAN, son of GANESHILAL AGARWAL)
sole Legatee named in the Last Will)
and Testament of the deceased abovenamed)
of bombay, Hindu Inhabitant,residing)
at 19, Neelam, 80 Marine Drive,)
Mumbai 400 002.)..Appellant
(Org. Plaintiff)

Versus

RAMGOPAL GANESHILAL MITTAL AGARWAL)
of Delhi, Indian Inhabitant,)
residing at 1287, Sultan Singh Gate,)
Kashmiri Gate, Delhi 110 006.)..Respondent
(Org. Defendant)

Ms. Rajni Iyer, Senior Advocate, i/b. Ms. Bhadra Dalal, Advocate for the appellant.

Mr. P.V.Sathe, Advocate, i/b. U.L.Shah,Advocate, for the respondent.

CORAM: D.K.DESHMUKH &

J.H.BHATIA,JJ.

JUDGMENT RESERVED ON: 12.09.2007

PRONOUNCED ON : 08.10.2007

JUDGMENT (PER J.H.BHATIA,J.)

1. Being aggrieved by the Judgment and Order dated 23rd August, 2001 passed by the learned Single Judge of this Court whereby the Testamentary Suit No.49 of 1989 in Testamentary Petition No. 209 of 1989 seeking Letter of Administration came to be dismissed, the original plaintiff/petitioner has preferred this Appeal.

2. To state in brief, it is an admitted fact that deceased, Ganeshilal Agrawal, had two sons who are the plaintiff and the defendant respectively and five daughters who were all married. Ganeshilal Pyarelal Agrawal was the resident of Hathras in U.P. His elder son Ramcharan, who is the plaintiff, is residing at Mumbai, while younger son Ramgopal, who is the defendant, is residing at Delhi. Ganekshilal and his two sons were carrying on business in partnership in the name and style of "M/s. Laljimal Tikaram" at three places i.e. Hathras, Mumbai and Delhi and each of them held 1/3rd share in the same and some other property. Ganeshilal had come to Mumbai on 24.9.1981. On 9.10.1981, he died at Mumbai. His body was taken to Hathras for funeral. His wife had died in the year 1969. The plaintiff filed the Testamentary Petition No.209 of 1989 in this High Court claiming Letter of

Administration of the property of the deceased on the basis of a Will allegedly executed by deceased Ganeshilal on 5.10.1981 bequeathing all his property exclusively to the plaintiff. Admittedly, in the year 1958, Ganeshilal had executed one Will bequeathing all his property to the plaintiff and the defendant equally, however, by the last Will dated 5.10.1981, he bequeathed all his property to the plaintiff alone. The defendant/caveator appeared and contested the petitioon and, therefore, it came to be registered as Testamentary Suit No.49 of 1989.

3. The defendant denied that his father Ganeshilal had executed any Will on 5.10.1981. According to him, the Will propounded by the plaintiff is a suspicious and fabricated document. The attesting witnesses, Vijaykumar Agarwal and Ramgopal Agarwal are son-inlaw and brother-in-law respectively of the plaintiff and they are interested in favour of the plaintiff. According to him, in earlier arbitration proceedings, the plaintiff had alleged that there was oral Will and in Suit No.737/1984 filed by the defendant in the Delhi High Court, the plaintiff had contended that there was another Will, but it was not available. According to the defendant, this Will has been propounded eight years after the death of father in suspicious circumstances and, therefore, no Letters of Administration can be

granted in favour of the plaintiff.

4. The learned Single Judge framed certain issues and after hearing the oral and documentary evidence produced by the party, held that the plaintiff had failed to prove that deceased Ganeshilal had executed the Will on 5.10.1981. In the result, the suit came to be dismissed.

5. In the Appeal, it is contended that the learned Single Judge failed to appreciate the oral and documentary evidence while coming to the conclusion that the Will was not executed by deceased Ganeshilal. It is contended that the learned Single Judge, after a minute scrutiny and discussion of the evidence, had come to the conclusion that the relations between the deceased and the defendant were very much strained, that the deceased was displeased with the defendant and he wanted to change his earlier Will as he did not wish to give any share in the properties to the defendant; that the deceased wanted to give whole of his property to the plaintiff and for that purpose, he wanted to make a fresh Will cancelling the earlier one, that the deceased was, at the relevant time, in a sound and disposing state of mind and that the Will Exhibit "G" bears signature of the deceased himself. Plaintiff contends that inspite of these findings, the learned Single

Judge, without any justification and without any material before him, came to the conclusion that the Will was prepared by the plaintiff on the old blank paper bearing signatures of the deceased to give effect to the desire of the deceased to make a bequest in his favour. It is also contended that the learned Single Judge committed error in coming to the conclusion that to explain the inordinate delay in surfacing of the Will Exhibit "G", a theory of late discovery of the Will has been put forward. It is also contended that the learned Single Judge committed error in holding that the old punch marked papers used for preparation of the Will, insertion of unwanted description of Kothi therein and the fluent signature of the deceased thereon speak for its manipulation. It is contended that the learned Single Judge also committed error in holding that the non-disclosure of the making of the Will by the deceased to the plaintiff is the most suspicious circumstance. It is contended that if the plaintiff wanted to forge the Will, he could have done it immediately after death of his father, but the record reveals that plaintiff was not showing any interest in making of Will of his father bequeathing whole of his property to him. It is contended that merely because the attesting witnesses are close relatives of the plaintiff, the document cannot be suspicious nor evidence of P.W.4 - Vijaykumar Agarwal, who is one of the attesting witnesses, can be

rejected on that ground particularly when in the cross-examination no material has come on record to disbelieve him. It is contended that this witness was not cross-examined on the point of punch marks or old thin nature of the papers used for the purpose of preparing the Will or about the other contents. It is contended that initially, the defendant had taken a plea that the signature on the Will is not of his father, but later on, an attempt was made to contend that the signature was genuine but the Will was prepared on the old blank paper bearing signature of his father.

6. Heard learned Counsel for the parties. The learned Counsel for the Plaintiff/appellant vehemently contended that Vijaykumar Agarwal had no reason to believe that Ganeshilal had not disclosed execution of the Will to the plaintiff and he, being son-in-law did not feel it necessary to speak about the Will to him or to other members of the family, including his wife. It is vehemently contended by the learned Counsel for the plaintiff that in 1981, the plaintiff was not aware about the execution of the Will, but he was aware that his father wanted to make a Will in his favour and he had also produced a note Ex.N prepared by his father, wherein he had expressed his desire to change the Will and to make a fresh Will bequeathing whole of his property to the plaintiff. After the suit was filed by

the defendant in the Delhi High Court, the plaintiff was required to visit Delhi frequently and, therefore, one day when the plaintiff had occasion to meet his son-in-law Vijaykumar, the latter asked him about the frequent visits. When he was told about the nature of the litigation, Vijaykumar disclosed that deceased Ganeshilal had executed a Will. On the basis of that the plaintiff took a stand before the Delhi High Court about execution of the Will, but as the Will was not available at that time, he also pleaded that the Will was not available. It is contended that the Will was traced out in the year 1989 from health file of the deceased which he himself used to maintain and then the Will was propounded and this petition for Letters of Administration was filed. This explains the delay of about 8 years in propounding the Will.

7. The learned Counsel for the respondent strongly supported the impugned order and the findings of the learned Single Judge. The learned Counsel for the defendant-respondent pointed out the following circumstances and improbabilities while challenging 4he execution of the Will by the deceased. It may be noted that these circumstances were raised before the trial Court and they are referred to in para 10 of the Judgment of the learned Single Judge.

"i) The paper of the will is old with a punch mark and a mark of removal of rusted pin. Spacing of lines is different.

ii) The description of the property (Kothi) given at the bottom of the document has no relevance to other contents and it is added to fill in the blank space between the last line and the signature of the deceased thereon.

iii) No evidence is produced as to who drafted and typed the will.

iv) Both the attesting witnesses are closely related to the plaintiff and are interested in him.

v) Non disclosure of the execution of the will to the plaintiff:

a) by the attesting witnesses for a period of three years and
b) by the deceased till his death.

vi) The will executed on 5.10.1981 became known in 1984 and was discovered in 1989. Till then it was lying in the Health File of the deceased

kept in a cupboard but despite extensive search it could not be located earlier.

vii) The deceased was ailing for quite some time before the making of the will and was not having sound and disposing mind.

viii) Unnatural disposition of property. Under his first will made in 1958, the deceased had given equal shares to both of his sons in his property. But the will of 1981 dis-inherits the defendant totally and confers all benefits exclusively on the plaintiff without assigning any reason.

ix) The plaintiff propounded an oral will of the deceased in other proceedings."

8. On behalf of the plaintiff, four witnesses were examined, while defendant examined himself. Out of the four witnesses examined by the plaintiff, PW-1 Anthony and PW-2 Manohar were officers of the Bank and they were called only to get the specimen signatures of the deceased. It may be noted that initially, it as a plea of the defendant that the signature on the Will is not of the deceased, but has been forged. It may be noted

that in the proceeding before the arbitrator in Delhi the signatures on the Will were also referred to one handwriting expert at the instance of the defendant however, the handwriting expert was not examined by the defendant in the present matter. During the cross-examination of the plaintiff, on behalf of the defendant, a theory was propounded that signatures on the Will are genuine, but the Will was prepared on the old blank papers bearing signatures of the deceased. In view of this stand, the evidence of P.W.1 and 2 becomes unnecessary and immaterial and, therefore, the learned Single Judge rightly came to the conclusion that the signatures on the Will are of the deceased. P.W.3 is the plaintiff himself and P.W.4 Vijaykumar is one of the attesting witnesses of the Will.

9. The learned Single Judge referred to several documents particularly the letters written by the deceased himself as well as a letter written by the defendant to his father to come to the conclusion that the relations between the deceased and the defendant were strained for about 3-4 years prior to his death. The learned Single Judge, after referring to the letters, particularly the letter Exhibit "C" dated 7.8.81, Exhibit "D" dated 10.8.81, Exhibit "I" dated 25.2.81, Exhibit "J" dated 28.5.81, Exhibit "L" dated 17.8.81 and Note Exhibit "N" which does not bear any

date came to the conclusion that these are the letters and the note in the handwriting of the deceased and the deceased was conversant not only with Hindi, but also English and in his letters, at many places, he had used English words. The learned Single Judge also noted that in the letter Exhibit "AA", written by the defendant to his father, he had used several English words and those English words were written in Roman script, which indicated that his father must be well acquainted with the English language. This discussion was necessary because signature of the deceased Ganeshilal as "Ganeshilal" is written in English on the disputed Will. After referring to the stand taken by the defendant during the evidence and the writings, the learned Single Judge came to the conclusion that the signatures on the Will Exhibit "G" are of deceased Ganeshilal.

10. The learned Single Judge referred to the contents of documents and letters extensively before coming to the conclusion that the relations between the deceased and the defendant were strained for a period of about 3-4 years and, therefore, the deceased had taken decision to dis-inherit the defendant from his property. Therefore he had taken a decision to cancel the earlier Will of 1958 and to make a fresh Will whereby he wanted to bequeath whole of his property to the plaintiff alone. It is not necessary to refer the contents of

those letters extensively in this Judgment. However, some examples may be given. In the letter Exhibit "I" dated 25.2.1981, the deceased expressed "I think R.G. (which means Ramgopal the defendant) has changed his mind or there is some mystery since before." The letter Exhibit "F" dated 15.2.81 from the defendant to his father also shows that his father was upset with him and his wife and was not happy about their behaviour. In the letter exhibit "J" dated 18.5.81, the deceased said "Day by day, R.G.'s behaviour is becoming worse." By letter exhibit "C" dated 7.8.81, the deceased warned the plaintiff against the activities of the defendant and to act after properly understanding the deeds of the defendant. In his letter Exhibit "D" dated 10.8.81, the deceased cautioned the plaintiff that the defendant would not bother for Shastra, religion, society, propriety and impropriety, but will go only by law and possession. He also told the plaintiff that they were compelled to prepare themselves for retaliation. By his letter Exhibit "L" dated 17.8.1981, the deceased clearly expressed that without a loss of even a minute the Will should be prepared in such a way that the defendant should not be in a position to challenge the same. In that letter, he also said "Will should be made at this moment and this is an important work which you do not like". In the said letter, he had also said that one Panditji of Giriraj had told him that his death was very

near and this was the reason why he was in hurry to make a Will. In the next para of the same letter, he directed the plaintiff to get prepared a draft of the Will and to despatch to him in a packed envelope as the defendant was capable of doing anything. If this letter is carefully read, it also indicates that while the deceased was expecting his death any moment, he wanted to make the Will immediately without loss of a moment. It also indicates that the desire of the deceased to make a fresh Will was not liked by the plaintiff. It shows that the plaintiff was not interested in getting the old Will revoked and in getting new Will made in his favour. Same desire has been expressed by him in letter Ex."K" of August 1981 as well as in the note Exhibit "N" which does not bear any date, but appears to be of the same period. In this note Exhibit "N", he clearly expressed that after his death, his 1/3rd share in business of L.T. (Laljimal Tikaram) will go to plaintiff Ramcharan and defendant Ramgopal will have no right in the same. In view of this documentary evidence from the letters written by the deceased himself, the learned Single Judge came to the following four conclusions :-

> "i) That the relations between the deceased and the defendant were very much strained.

ii) That the deceased was displeased with the defendant and he wanted to change his earlier will as he did not wish to give any share in his properties to the defendant.

iii) That the deceased wanted to give his properties to the plaintiff and for that purpose he wanted to make a fresh will cancelling the earlier one.

iv) The deceased had at the relevant time sound and disposing mind."

After going through the documentary evidence, we fully endorse these conclusions drawn by the learned Single Judge.

11. Having arrived at the above conclusions, the learned Single Judge proceeded to discuss the evidence and contentions of the rival parties to come to conclusion that Exhibit "G" is not the genuine document executed by deceased. The learned Single Judge noted that there was delay of about 8 years in propounding this Will and if the Will was executed by the deceased he would have disclosed this fact to the plaintiff and even the attesting witness, PW-4 Vijaykumar would have informed the plaintiff or at least his own wife. The

learned Single Judge also found that the paper used for making the will appears to be very old and had some old punch marks creating suspicion about the same. The learned Single Judge also found that the deceased Ganeshilal was not keeping good health and his handwriting had become shaky. Though the alleged will was executed only 4 days before his death, the signature appears to be fluent. Therefore, the learned Single Judge came to the conclusion that the plaintiff must have used some old blank paper bearing signature of his father to prepare the disputed Will.

12. The learned Single Judge relied upon **H. Venkatachala Iyenger v/s. b. N. Thimma Jamma & Ors. AIR 1959 SC 443** wherein Their Lordships observed as follows :-

> "Apart from the suspicious circumstances to which we have just referred in some cases the will propounded discloses another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstances

> attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence."

The learned Single Judge also relied upon **Jaswant Kaur V/s. Amrit Kaur AIR 1997 SC 74** wherein Their Lordships observed as follows :-

> "In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lit between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent ad convincing explanation of the suspicious circumstances surrounding the making of the will."

There can be no dispute about the legal proposition stated in the above two authorities. The evidence led

by the parties and the reasons given by the learned Single Judge for dismissing the suit will have to be minutely considered in the light of the above authorities.

13. The learned Single Judge found that there were punch marks on both the sheets of the Will and the papers were very old and, therefore, there was possibility that the old blank papers bearing signatures of the deceased were used for that purpose. We find that no question was put to the attesting witness Vijaykumar about the condition of the papers or about the punch marks on the same. It needs to be noted that the said Will purports to have been prepared on 5.10.81. The evidence was recorded during the year 1999-2000 and the judgment was pronounced in August 2001. When the learned Single Judge must have perused these documents in the year 2001, the papers were admittedly about 20 years old and, therefore, merely because the papers appear to be old, it was difficult to come to the conclusion that the old papers were used for the preparation of the Will in the year 1981 or thereafter.

14. The learned Counsel for the plaintiff contended that about the dispute before the arbitrator at Delhi,this document was sent to Delhi and was referred to handwriting expert. According to her, there is

possibility that when these papers were sent to Delhi in a packet, they must have been punched. That itself was in the year 1990 or so. If the pin used for that purpose gets rusted, it will leave its marks and the period of about 10 - 11 years is not short for this purpose. Therefore, in our considered opinion, the old punch marks are also not sufficient ground to hold that these were the old blank signed papers lying with the plaintiff when the Will got prepared. In our considered opinion, the evidence of attesting witness, Vijaykumar, was material and in absence of any cross-examinatioon in this respect we find it difficult to endorse the view taken by the learned Single Judge on this point.

15. The learned Single Judge noted that the plaintiff himself had admitted in the cross that he had used two blank cheques bearing signatures of his father and had withdrawn the amount of Rs.1,20,000/- from his account after his death and this indicates that he had the capacity to manipulate the record. The evidence on record clearly shows that Ganeshilal and his two sons were carrying on business at three different places i.e. Hathras, Delhi and Mumbai in partnership and each of them was required to deal with the banks on behalf of partnership firm. It is possible that for the purpose of the business, the blank signed cheques were kept by the deceased Ganeshilal with the plaintiff and they were

used for the same purpose. The learned counsel for the plaintiff vehemently argued that blank cheques and blank papers were altogether different matter while the cheques were required for everyday business depending on the requirement of the business, blank papers were not required for writing any letters, etc. There is no material to show that any such blank paper was ever left by the deceased with the plaintiff or the defendant The learned Single Judge seems to have drawn the inference that signed blank papers must be lying with the plaintiff merely because such cheques were with him. In our opinion, it will not be proper to draw such inference.

16. The evidence on record shows that on 24.9.1981, deceased was brought to Mumbai by train. He was 88 years old at that time. On 5.10.81, he allegedly executed the Will and he died on 9.10.81. The learned Single Judge noted that when he came to Mumbai after undergoing continuous journey of 20 - 22 hours, he was tired and exhausted, particularly because he had previously suffered heart attach also. There is no dispute that he had suffered heart attack sometime in early part of 1981, but if his correspondence and even his note written on 5.10.81 itself are perused, it appears that he was physically as well as mentally alert and active. On 5.10.81, he had written a note Exhibit

"B" about his minute health problems particularly about excessive urination, weakness, some pain in chest and right arm, pain in spinal cord, shoulders, bones, etc. At the age of 88 years and few days before his death, if he was suffering from such problems, it was not something exceptional, but his noting down such health problems minutely was, in fact, an exceptional thing for an old man aged 88 years. If we look to his correspondence, referred earlier which was made during the month of February-March, 1981 and in August 1981 onwards it appears that he was mentally alert and was keeping a minute watch on the defendant and he used to advise the plaintiff about such matters. The Will was allegedly executed 11 days after his arrival at Bombay. Therefore tiring journey of 20-22 hours could have no effect on him when the Will was executed.

17. The learned Single Judge noted that his handwriting appears to have become shaky, while his signatures on the disputed Will Exhibit "G" which appear to be genuine, do not give any indication of such shaking of hand. We have carefully gone through his letters written by him as late as August 1981. It may be noted that he used to generally write in Hindi, but in some of the letters, he also used English words written in Roman script. Looking to such English words written by him in his letters Exhibits "C" dated 13.8.81

and Ex. "D" dated 10.8.81, it is difficult to come to conclusion that his hand was shaking or there was any change in his writing due to old age. If his signatures on the earlier Will Exhibit "S" of 1958, his specimen signature with Banks of 1973 and the disputed Will are compared, one finds no difference. Same can be said about his handwriting particularly address written by him on the different inland letters, etc. The attesting witness Vijaykumar has specifically deposed that deceased had put signatures on the Will in presence of himself and another attesting witness Ramgopal and they had also in turn put signatures in presence of the deceased. Even though defendant No.1 had referred the disputed Will to handwriting expert, when the matter was pending for arbitration at Delhi, he did not examine the handwriting expert in this matter to establish that the signatures on the disputed Will are not of the deceased. It is important because initially he had pleaded that the signatures were forged, but later on, he took a different stand contending that the signature was genuine but the old blank papers bearing signatures of the deceased were used for forging Will.

18. It was contended on behalf of the defendant and the learned Single Judge accepted that Vijaykumar, being son-in-law, and another attesting witness Ramgopal Agrawal, being plaintiff’s wife’s brother, are closely

related to him and Ramgopal had financial dealings with the plaintiff and, therefore, they were interested for the plaintiff. It is true that they are close relatives of the plaintiff, but merely because of this reason evidence of Vijaykumar cannot be discarded or disbelieved nor the Will can be suspected. It may be noted that on 24.10.1973, the defendant had settled a trust for the benefit of the wife and children of the plaintiff and in that trust, Ganeshilal, defendant and his wife were the trustees. It is the contention of the plaintiff that a similar trust was also settled by his brother-in-law, Ramgopal Agrawal in favour of the wife and children of the defendant. A notice was issued to the defendant to produce that trust deed however, the defendant refused to produce the same. In view of his non-production, inference can be drawn that if that document would be produced, it would reveal that the attesting witness Ramgopal was settlor of that trust deed. If it is so, it appears that Ramgopal Agrawal was close with both the parties even though he happens to be brother-in-law of the plaintiff. It has come on record that he was advanced an amount of Rs.71,000/- for his business by the plaintiff, but that itself cannot be a ground to disbelieve him.

19. It is vehemently contended on behalf of the defendant that non-disclosure of the Will by the

deceased as well as the attesting witnesses to the plaintiff immediately after execution of the Will as well as delay in propounding the Will is very serious to suspect the genuineness of the Will. The learned Single Judge accepted this contention. However, if evidence is closely scrutinised, taking into consideration the desire of the deceased to execute a Will in favour of the plaintiff, excluding the defendant from inheritance and the other circumstances, this contention cannot be accepted. Already it is pointed out that the deceased had repeatedly expressed his desire to execute a will particularly because of the conduct and behaviour of the defendant which was day-to-day worsening. The letter Exhibit "F" dated 15.2.81 from the defendant to his father clearly indicates that the deceased was not happy not only with the defendant, but also with his wife. The deceased expressed in the letter Exhibit "L" dated 17.8.81 that he wanted his will to be executed without loss of a minute. He also expressed that the plaintiff did like this idea which indicates that the plaintiff was not keen on the change of Will and possibly this was the reason that when the deceased executed the Will on 5.10.81, even at the house of the plaintiff himself at Mumbai, he did not feel it necessary to disclose this fact to him.

20. The attesting witness Vijaykumar is the

son-in-law of the plaintiff. They belong to Marwadi community. He was married only few years before i.e. on 7.12.1977 and it appears that he did not feel it proper to interfere in the family and property matters of his father-in-law. May be, due to this reason, when the deceased asked him to read the contents of the Will before its execution,Vijaykumar said that it was not necessary and thereafter the deceased put signatures on it in presence of both the attesting witnesses. Possibility cannot be ruled out that Vijaykumar was under the impression that the plaintiff must be aware about the Will and therefore he did not speak about it either to the plaintiff or to his own wife. It appears from the evidence that in 1984, when in connection with the suit filed by the defendant in the Delhi High Court, the plaintiff was required to go there repeatedly and when Vijaykumar came to know about it, he told the plaintiff that there was a Will executed by the deceased and, according to the plaintiff, at that time for the first time, he came to know that the Will was actually executed. Admittedly, prior to that when the matter was before the arbitrator, the plaintiff had produced the Note Exhibit "N" written by the deceased to show the desire of the deceased to bequeath whole of his property in favour of the plaintiff and he had taken a plea that even though it was oral it was as good as written. Such a stand could not be accepted. After he came to know

from the attesting witness Vijaykumar in 1984, that in fact, such a Will was executed, he took that stand before the Court in Delhi but also pleaded that the Will was not available. He explained that in 1989, during the search of the almirah, which was in use of the deceased father, he found a file containing health papers of the deceased and in those papers he also found the Will of the deceased and thereafter he propounded it. In such circumstances, if the Will was actually found in the year 1989 and shortly after that the plaintiff filed the petition for letters of administration, it cannot be said that delay in propounding the Will is not explained.

21. The learned Single Judge noted that as per the custom among Hindus, clothes of deceased are disposed of on the 10th day. However, in his evidence, the plaintiff denied that there was any such custom, though of course, it can be believed that after the death of a person the relatives would not retain the clothes of the deceased for very long period unless there is some special reason for the same. The evidence reveals that after his death, his dead body was taken to Hathras by flight for funeral. There is a possibility while taking his body, the plaintiff and other family members might not have collected all the clothes and papers of the deceased with them. It appears that later

on a trunk of the deceased lying in the house was searched but no Will was found. However, later on, a file containing health papers and the Will was found in an almirah under the clothes. This has lost sight of for long time. Therefore merely because the file containing health papers as well as the Will remained in the cupboard unattended for long time, genuineness of the Will cannot be suspected.

22. It was argued on behalf of the defendant that the person who had drafted or typed the disputed Will has not been examined and that is also a ground to suspect the genuineness of the same. In fact, it is not necessary for the propounder of the Will, unless he himself had taken active part in preparation and execution of the same, to produce such evidence. In fact, if, as the circumstances of the present matter revealed, the plaintiff himself was not keen on execution of such a Will and he had not played any role in preparation and execution of the same, he could not be expected to know about the person who had drafted the Will or who had typed it. The evidence on record reveals that while in Mumbai, the deceased had taken assistance of one Krishna Kumar who had taken him to Advocate Chaganbhai. It appears that deceased must have consulted him before preparing and executing the Will as in his letters addressed to the plaintiff, in the month

of August, he had cautioned that it was necessary to be careful so that Will could not be challenged by the defendant. In our opinion, when by an unimpeachable evidence, it is proved that the deceased wanted to dis-inherit the defendant and to bequeath whole of his property to the plaintiff and when genuineness of his signature on the disputed Will is also no more in dispute and when the attesting witness, Vijaykumar, has also deposed that the Will was actually executed by the deceased in his prtesence, we find no justification to suspect the same merely because Krishna Kumar or Advocate Chaganbhai were not examined. In fact, none of them was the attesting witness. It is argued on behalf of the defendant and the learned Single Judge also upheld the argument to the effect that the disputed Will is identical with the earlier Will of 1958 Exhibit "S". On perusal of these two Wills, it can be said that when the disputed Will Exhibit "G" was typed, the earlier Will must have been before the person who drafted or typed it because some of the sentences are word to word identical. However, there were two differences. First difference is that in the earlier Will, property of the deceased was bequeathed to the plaintiff and defendant equally, while in the latter Will, whole of his property was bequeathed to the plaintiff alone. Another difference is that when the earlier Will was prepared , wife of the deceased was alive and, therefore, he had

given life estate in his Kothi at Hathras after her death to both the sons equally, but she was no more alive when the disputed Will as prepared in 1981 and therefore there is no specific mention about bequeathing the Kothi. It is pointed out on behalf of the defendant that in the earlier Will, the description of Kothi at Hathras was written by the deceased himself below the sentence "In witness whereof I Ganeshilal abovenamed do hereby set my hand at Hathras this 24th day of May 1958". Below this sentence, the description of the Kithi was given and then there were signatures of the deceased and the attesting witnesses. Similar position is to be found in the disputed Will Exhibit "G". In view of the fact that the second Will is totally silent about the Kothi the description of that Kothi at the bottom of the second Will in the above referred manner is unnecessary and irrelevant. It is contended that possibly because there was sufficient space between the signature of the deceased and the above referred sentence to fill in the gap the description of the Kothi was typed In our opinion, there is a possibility that the deceased might have given the earlier Will to the person who prepared and typed it with the instructions about changes. Possibility cannot be ruled that the person, who typed the Will, mechanically noted down the description of the Kothi in the same manner though it was not necessary. In our opinion, this circumstance

also cannot be sufficient to discard the disputed Will.

23. Having considered the evidence minutely and the reasons given by the learned Single Judge for suspecting the genuineness of the Will, we find ourselves unable to agree with the learned Single Judge. Taking overall view of the documentary and oral evidence on record, we are satisfied that the Will Exhibit "G" is a genuine document and the plaintiff is entitled to get letter of administration. Therefore, we find that the Judgment and Order passed by the learned Single Judge are liable to be set aside.

24. In the result, the Appeal is allowed. The Judgment and order passed by the learned Single Judge in Testamentary Suit No.49 of 1989 in Testamentary Petition No.209 of 1989 are hereby set aside. The suit is decreed. The Letters of Administration be issued as prayed. No order as to costs.

(D.K. DESHMUKH,J.)

(J.H.BHATIA,J.)